

1 Scott D. Cunningham (State Bar No.: 200413)
2 Email: scunningham@condonlaw.com
3 Jennifer J. Johnston (State Bar No.: 125737)
4 Email: jjohnston@condonlaw.com
5 Ivy L. Nowinski (State Bar No.: 268564)
6 Email: inowinski@condonlaw.com
7 Grace M. Lau (State Bar No.” 312977)
8 Email: glau@condonlaw.com
9 CONDON & FORSYTH LLP
10 1901 Avenue of the Stars, Suite 850
11 Los Angeles, California 90067-6010
12 Telephone: (310) 557-2030
13 Facsimile: (310) 557-1299

14 Attorneys for Defendant
15 ALL NIPPON AIRWAYS CO., LTD.
16
17

18 UNITED STATES DISTRICT COURT
19
20 NORTHERN DISTRICT OF CALIFORNIA
21
22

23 ASHLEY BUGARIN, on behalf of herself and) Case No. 5:20-cv-03341-BLF
24 all others similarly situated,)
25 Plaintiff,) **DEFENDANT ALL NIPPON AIRWAYS**
26 vs.) **CO. LTD.’S NOTICE OF MOTION AND**
27 ALL NIPPON AIRWAYS CO., LTD.,) **MOTION TO COMPEL**
28 Defendant.) **ARBITRATION AND DISMISS**
29) **PLAINTIFF’S SECOND AMENDED**
30) **COMPLAINT**
31) Date: August 12, 2021
32) Time: 9:00 a.m.
33) Courtroom: 3 - 5th Floor
34) Judge: Hon. Beth Labson
35) Freeman
36) [Filed concurrently herewith Declaration of
37) Grace M. Lau, Declaration of Peter Vazan,
38) Request for Judicial Notice, and [Proposed]
39) Order]
40)
41)
42)
43)
44)
45)
46)
47)
48)
49)
50)
51)
52)
53)
54)
55)
56)
57)
58)
59)
60)
61)
62)
63)
64)
65)
66)
67)
68)
69)
70)
71)
72)
73)
74)
75)
76)
77)
78)
79)
80)
81)
82)
83)
84)
85)
86)
87)
88)
89)
90)
91)
92)
93)
94)
95)
96)
97)
98)
99)
100)
101)
102)
103)
104)
105)
106)
107)
108)
109)
110)
111)
112)
113)
114)
115)
116)
117)
118)
119)
120)
121)
122)
123)
124)
125)
126)
127)
128)
129)
130)
131)
132)
133)
134)
135)
136)
137)
138)
139)
140)
141)
142)
143)
144)
145)
146)
147)
148)
149)
150)
151)
152)
153)
154)
155)
156)
157)
158)
159)
160)
161)
162)
163)
164)
165)
166)
167)
168)
169)
170)
171)
172)
173)
174)
175)
176)
177)
178)
179)
180)
181)
182)
183)
184)
185)
186)
187)
188)
189)
190)
191)
192)
193)
194)
195)
196)
197)
198)
199)
200)
201)
202)
203)
204)
205)
206)
207)
208)
209)
210)
211)
212)
213)
214)
215)
216)
217)
218)
219)
220)
221)
222)
223)
224)
225)
226)
227)
228)
229)
230)
231)
232)
233)
234)
235)
236)
237)
238)
239)
240)
241)
242)
243)
244)
245)
246)
247)
248)
249)
250)
251)
252)
253)
254)
255)
256)
257)
258)
259)
260)
261)
262)
263)
264)
265)
266)
267)
268)
269)
270)
271)
272)
273)
274)
275)
276)
277)
278)
279)
280)
281)
282)
283)
284)
285)
286)
287)
288)
289)
290)
291)
292)
293)
294)
295)
296)
297)
298)
299)
300)
301)
302)
303)
304)
305)
306)
307)
308)
309)
310)
311)
312)
313)
314)
315)
316)
317)
318)
319)
320)
321)
322)
323)
324)
325)
326)
327)
328)
329)
330)
331)
332)
333)
334)
335)
336)
337)
338)
339)
340)
341)
342)
343)
344)
345)
346)
347)
348)
349)
350)
351)
352)
353)
354)
355)
356)
357)
358)
359)
360)
361)
362)
363)
364)
365)
366)
367)
368)
369)
370)
371)
372)
373)
374)
375)
376)
377)
378)
379)
380)
381)
382)
383)
384)
385)
386)
387)
388)
389)
390)
391)
392)
393)
394)
395)
396)
397)
398)
399)
400)
401)
402)
403)
404)
405)
406)
407)
408)
409)
410)
411)
412)
413)
414)
415)
416)
417)
418)
419)
420)
421)
422)
423)
424)
425)
426)
427)
428)
429)
430)
431)
432)
433)
434)
435)
436)
437)
438)
439)
440)
441)
442)
443)
444)
445)
446)
447)
448)
449)
450)
451)
452)
453)
454)
455)
456)
457)
458)
459)
460)
461)
462)
463)
464)
465)
466)
467)
468)
469)
470)
471)
472)
473)
474)
475)
476)
477)
478)
479)
480)
481)
482)
483)
484)
485)
486)
487)
488)
489)
490)
491)
492)
493)
494)
495)
496)
497)
498)
499)
500)
501)
502)
503)
504)
505)
506)
507)
508)
509)
510)
511)
512)
513)
514)
515)
516)
517)
518)
519)
520)
521)
522)
523)
524)
525)
526)
527)
528)
529)
530)
531)
532)
533)
534)
535)
536)
537)
538)
539)
540)
541)
542)
543)
544)
545)
546)
547)
548)
549)
550)
551)
552)
553)
554)
555)
556)
557)
558)
559)
560)
561)
562)
563)
564)
565)
566)
567)
568)
569)
570)
571)
572)
573)
574)
575)
576)
577)
578)
579)
580)
581)
582)
583)
584)
585)
586)
587)
588)
589)
590)
591)
592)
593)
594)
595)
596)
597)
598)
599)
600)
601)
602)
603)
604)
605)
606)
607)
608)
609)
610)
611)
612)
613)
614)
615)
616)
617)
618)
619)
620)
621)
622)
623)
624)
625)
626)
627)
628)
629)
630)
631)
632)
633)
634)
635)
636)
637)
638)
639)
640)
641)
642)
643)
644)
645)
646)
647)
648)
649)
650)
651)
652)
653)
654)
655)
656)
657)
658)
659)
660)
661)
662)
663)
664)
665)
666)
667)
668)
669)
670)
671)
672)
673)
674)
675)
676)
677)
678)
679)
680)
681)
682)
683)
684)
685)
686)
687)
688)
689)
690)
691)
692)
693)
694)
695)
696)
697)
698)
699)
700)
701)
702)
703)
704)
705)
706)
707)
708)
709)
710)
711)
712)
713)
714)
715)
716)
717)
718)
719)
720)
721)
722)
723)
724)
725)
726)
727)
728)
729)
730)
731)
732)
733)
734)
735)
736)
737)
738)
739)
740)
741)
742)
743)
744)
745)
746)
747)
748)
749)
750)
751)
752)
753)
754)
755)
756)
757)
758)
759)
760)
761)
762)
763)
764)
765)
766)
767)
768)
769)
770)
771)
772)
773)
774)
775)
776)
777)
778)
779)
780)
781)
782)
783)
784)
785)
786)
787)
788)
789)
790)
791)
792)
793)
794)
795)
796)
797)
798)
799)
800)
801)
802)
803)
804)
805)
806)
807)
808)
809)
810)
811)
812)
813)
814)
815)
816)
817)
818)
819)
820)
821)
822)
823)
824)
825)
826)
827)
828)
829)
830)
831)
832)
833)
834)
835)
836)
837)
838)
839)
840)
841)
842)
843)
844)
845)
846)
847)
848)
849)
850)
851)
852)
853)
854)
855)
856)
857)
858)
859)
860)
861)
862)
863)
864)
865)
866)
867)
868)
869)
870)
871)
872)
873)
874)
875)
876)
877)
878)
879)
880)
881)
882)
883)
884)
885)
886)
887)
888)
889)
890)
891)
892)
893)
894)
895)
896)
897)
898)
899)
900)
901)
902)
903)
904)
905)
906)
907)
908)
909)
910)
911)
912)
913)
914)
915)
916)
917)
918)
919)
920)
921)
922)
923)
924)
925)
926)
927)
928)
929)
930)
931)
932)
933)
934)
935)
936)
937)
938)
939)
940)
941)
942)
943)
944)
945)
946)
947)
948)
949)
950)
951)
952)
953)
954)
955)
956)
957)
958)
959)
960)
961)
962)
963)
964)
965)
966)
967)
968)
969)
970)
971)
972)
973)
974)
975)
976)
977)
978)
979)
980)
981)
982)
983)
984)
985)
986)
987)
988)
989)
990)
991)
992)
993)
994)
995)
996)
997)
998)
999)
1000)
1001)
1002)
1003)
1004)
1005)
1006)
1007)
1008)
1009)
1010)
1011)
1012)
1013)
1014)
1015)
1016)
1017)
1018)
1019)
1020)
1021)
1022)
1023)
1024)
1025)
1026)
1027)
1028)
1029)
1030)
1031)
1032)
1033)
1034)
1035)
1036)
1037)
1038)
1039)
1040)
1041)
1042)
1043)
1044)
1045)
1046)
1047)
1048)
1049)
1050)
1051)
1052)
1053)
1054)
1055)
1056)
1057)
1058)
1059)
1060)
1061)
1062)
1063)
1064)
1065)
1066)
1067)
1068)
1069)
1070)
1071)
1072)
1073)
1074)
1075)
1076)
1077)
1078)
1079)
1080)
1081)
1082)
1083)
1084)
1085)
1086)
1087)
1088)
1089)
1090)
1091)
1092)
1093)
1094)
1095)
1096)
1097)
1098)
1099)
1100)
1101)
1102)
1103)
1104)
1105)
1106)
1107)
1108)
1109)
1110)
1111)
1112)
1113)
1114)
1115)
1116)
1117)
1118)
1119)
1120)
1121)
1122)
1123)
1124)
1125)
1126)
1127)
1128)
1129)
1130)
1131)
1132)
1133)
1134)
1135)
1136)
1137)
1138)
1139)
1140)
1141)
1142)
1143)
1144)
1145)
1146)
1147)
1148)
1149)
1150)
1151)
1152)
1153)
1154)
1155)
1156)
1157)
1158)
1159)
1160)
1161)
1162)
1163)
1164)
1165)
1166)
1167)
1168)
1169)
1170)
1171)
1172)
1173)
1174)
1175)
1176)
1177)
1178)
1179)
1180)
1181)
1182)
1183)
1184)
1185)
1186)
1187)
1188)
1189)
1190)
1191)
1192)
1193)
1194)
1195)
1196)
1197)
1198)
1199)
1200)
1201)
1202)
1203)
1204)
1205)
1206)
1207)
1208)
1209)
1210)
1211)
1212)
1213)
1214)
1215)
1216)
1217)
1218)
1219)
1220)
1221)
1222)
1223)
1224)
1225)
1226)
1227)
1228)
1229)
1230)
1231)
1232)
1233)
1234)
1235)
1236)
1237)
1238)
1239)
1240)
1241)
1242)
1243)
1244)
1245)
1246)
1247)
1248)
1249)
1250)
1251)
1252)
1253)
1254)
1255)
1256)
1257)
1258)
1259)
1260)
1261)
1262)
1263)
1264)
1265)
1266)
1267)
1268)
1269)
1270)
1271)
1272)
1273)
1274)
1275)
1276)
1277)
1278)
1279)
1280)
1281)
1282)
1283)
1284)
1285)
1286)
1287)
1288)
1289)
1290)
1291)
1292)
1293)
1294)
1295)
1296)
1297)
1298)
1299)
1300)
1301)
1302)
1303)
1304)
1305)
1306)
1307)
1308)
1309)
1310)
1311)
1312)
1313)
1314)
1315)
1316)
1317)
1318)
1319)
1320)
1321)
1322)
1323)
1324)
1325)
1326)
1327)
1328)
1329)
1330)
1331)
1332)
1333)
1334)
1335)
1336)
1337)
1338)
1339)
1340)
1341)
1342)
1343)
1344)
1345)
1346)
1347)
1348)
1349)
1350)
1351)
1352)
1353)
1354)
1355)
1356)
1357)
1358)
1359)
1360)
1361)
1362)
1363)
1364)
1365)
1366)
1367)
1368)
1369)
1370)
1371)
1372)
1373)
1374)
1375)
1376)
1377)
1378)
1379)
1380)
1381)
1382)
1383)
1384)
1385)
1386)
1387)
1388)
1389)
1390)
1391)
1392)
1393)
1394)
1395)
1396)
1397)
1398)
1399)
1400)
1401)
1402)
1403)
1404)
1405)
1406)
1407)
1408)
1409)
1410)
1411)
1412)
1413)
1414)
1415)
1416)
1417)
1418)
1419)
1420)
1421)
1422)
1423)
1424)
1425)
1426)
1427)
1428)
1429)
1430)
1431)
1432)
1433)
1434)
1435)
1436)
1437)
1438)
1439)
1440)
1441)
1442)
1443)
1444)
1445)
1446)
1447)
1448)
1449)
1450)
1451)
1452)
1453)
1454)
1455)
1456)
1457)
1458)
1459)
1460)
1461)
1462)
1463)
1464)
1465)
1466)
1467)
1468)
1469)
1470)
1471)
1472)
1473)
1474)
1475)
1476)
1477)
1478)
1479)
1480)
1481)
1482)
1483)
1484)
1485)
1486)
1487)
1488)
1489)
1490)
1491)
1492)
1493)
1494)
1495

1 Arbitration Act or, in the alternative, dismissal of the same pursuant to Rule 12(b)(6) of the
2 Federal Rules of Civil Procedure.

3 This motion will be based on this Notice of Motion, the Memorandum of Points and
4 Authorities below, the Request for Judicial Notice, the Declaration of Grace M. Lau, the
5 Declaration of Peter Vazan and any oral argument presented at the hearing of this motion.

6
7 Dated: March 5, 2021

CONDON & FORSYTH LLP

8
9 By:/s/ Scott D. Cunningham _____
10 SCOTT D. CUNNINGHAM
11 JENNIFER J. JOHNSTON
12 IVY L. NOWINSKI
13 GRACE M. LAU
14 Attorneys for Defendant
15 ALL NIPPON AIRWAYS CO., LTD.
16
17
18
19
20
21
22
23
24
25
26
27
28

CONDON & FORSYTH LLP
1901 Avenue of the Stars, Suite 850
Los Angeles, California 90067-6010
Telephone: (310) 557-2030

1 TABLE OF CONTENTS

3	TABLE OF AUTHORITIES	ii-iv
4	INTRODUCTION	1
5	STATEMENT OF ISSUES TO BE DECIDED	2
6	STATEMENT OF RELEVANT FACTS	2
7	I. Plaintiff's Ticketing and Interactions with ANA and ASAP	2
8	II. Procedural History of Plaintiff's Claim	3
9	III. ANA's Conditions of Carriage	4
10	IV. ASAP's Policies Pursuant to its Rules and Conditions and Relation to International Travel Network.....	4
11	V. DOT Guidelines in Response to COVID-19	5
12	LEGAL STANDARD.....	6
13	ARGUMENT	7
14	I. The Allegations in Plaintiff's SAC Require Arbitration of Her Claim against ANA.....	7
15	A. Plaintiff Had Inquiry Notice of ASAP's Rules and Conditions and Is Bound By Its Provisions Including the Arbitration Clause	7
16	B. The SAC Relies upon ASAP's Rules and Conditions to Demonstrate ANA Frustrated the Condition Precedent and, therefore, ANA May Enforce ASAP's Arbitration Provision	9
17	II. As a Separate and Independent Basis for Dismissal, the SAC Must Be Dismissed Because It Does Not Plead Facts Sufficient to State a Claim for Relief Against ANA	12
18	I. Plaintiff's Amended Allegations Concede ANA's COC Contain a Condition Precedent and Do Not Demonstrate She was Excused from Performing the Condition	12
19	II. Plaintiff's Amended Allegations Concede She Was Offered a Refund from ASAP and that She Refused to Accept the Refund.....	15
20	III. ANA's Evidentiary Objections to Plaintiff's Exhibit B to the SAC.....	17
21	CONCLUSION	19
22		
23		
24		
25		
26		
27		
28		

1 TABLE OF AUTHORITIES
2

3 Page(s)

4 Cases
5

6 <i>A&M Records, Inc. v. Napster, Inc.</i> , 7 No. C9905183MHP, 2000 WL 1170106 (N.D. Cal. Aug. 10, 2000)	17, 18, 19
8 <i>Allen v. Shutterfly, Inc.</i> , 9 No. 20-cv-02448 BLF, 2020 WL 5517172 (N.D. Cal. Sep. 14, 2020).....	8
10 <i>Allied-Bruce Terminix Cos., Inc. v. Dobson</i> , 11 513 U.S. 265 (1995).....	7
12 <i>Ashbey v. Archstone Prop. Mgmt. Inc.</i> , 13 785 F. 3d 1320 (9th Cir. 2015)	7
14 <i>Ashcroft v. Iqbal</i> , 15 556 U.S. 662 (2009).....	6, 14
16 <i>Binder v Aetna Life Ins. Co.</i> , 17 75 Cal. App. 4th 832 (1999)	8
18 <i>Britton v. Co-op Banking Group</i> , 19 4 F.3d 742 (9th Cir. 1993)	10
20 <i>Caltex Plastics, Inc. v. Lockheed Martin Corp.</i> , 21 824 F.3d 1156 (9th Cir. 2016)	12
22 <i>City of Hollister v. Monterey Ins. Co.</i> , 23 165 Cal. App.4th 455 (Cal. Ct. App. 2008).....	14
24 <i>Dean Witter Reynolds, Inc. v. Byrd</i> , 25 470 U.S. 213 (1985).....	7
26 <i>Epic Sys. Corp. v. Lewis</i> , 27 138 S. Ct. 1612 (2018).....	7
28 <i>FNBN Rescon I, LLC v. Citrus El Dorado, LLC</i> , 29 725 F. App'x 448 (9th Cir. 2018)	14
30 <i>Goldman v. KPMG, LLP</i> , 31 173 Cal. App. 4th 209	10
32 <i>Holl v. United Parcel Service, Inc.</i> , 33 No. 16-cv-05856-HSG, 2017 WL 11520143 (N.D. Cal. Sep. 18, 2017).....	9
34 <i>Jones v. Jacobson</i> , 35 195 Cal. App. 4th 1 (2011)	10

1	<i>Kramer v. Toyota Motor Corp.</i> , 705 F.3d 1122 (9th Cir. 2013)	7, 10
2		
3	<i>Louisiana Mun. Police Employees' Ret. Sys.</i> , 829 F. 3d 1048 (9th Cir. 2016)	7
4		
5	<i>Luna v. Kemira Specialty, Inc.</i> , 575 F.Supp.2d 1166 (C.D. Cal. 2008)	12
6		
7	<i>Maree v. Deutsche Lufthansa AG</i> , No. SACV 20-855-MWF, 2021 WL 267853 (C.D. Cal. Jan. 26, 2021)	8
8		
9	<i>Mohamed v. Uber Technologies, Inc.</i> , 109 F. Supp. 3d 1185 (N.D. Cal. 2015)	9
10		
11	<i>Mundi v. Union Sec. Life Ins. Co.</i> , 555 F.3d 1045 (9th Cir. 2009)	10
12		
13	<i>Needle v. Golden 1 Credit Union</i> , 474 F. Supp. 3d 1097 (N.D. Cal. 2020)	8
14		
15	<i>Nguyen v. Barnes & Noble Inc.</i> , 763 F.3d 1171 (9th Cir 2014)	7, 8
16		
17	<i>In re Pacific Fertility Center Litigation</i> , 814 Fed. Appx. 206 (9th Cir. 2020)	10, 11
18		
19	<i>SEIU Local 121RN v. Los Robles Reg'l Med. Ctr.</i> , 976 F. 3d 849 (9th Cir. 2020)	7
20		
21	<i>Simula Inc. v. Autoliv, Inc.</i> , 175 F.3d 716	12
22		
23	<i>Somers v. Apple, Inc.</i> , 729 F.3d 953 (9th Cir. 2013)	6
24		
25	Statutes	
26	FED. R. CIV. P. 12(b)(6) (West 2021).....	1, 6, 12, 15
27		
28	FED. R. EVID. 602 (West 2021).....	18
29		
30	FED. R. EVID. 701 (West 2021).....	17, 18, 19
31		
32	9 U.S.C. § 2 (West 2021).....	2, 6, 7, 12
33		
34	9 U.S.C. § 3 (West 2021).....	12
35		
36	49 U.S.C. § 41712 (West 2021).....	6
37		
38	CAL. BUS. & PROF. CODE § 17550 (West 2021)	5, 16

1	CAL. BUS. & PROF. §17550.14 (West 2021)	16
2	Other Authorities	
3	14 CFR § 399.80(1)	6
4		
5		
6		
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

CONDON & FORSYTH LLP
1901 Avenue of the Stars, Suite 850
Los Angeles, California 90067-6010
Telephone: (310) 557-2030

1 **MEMORANDUM OF POINTS AND AUTHORITIES**2 **INTRODUCTION**

3 This action is Plaintiff's putative class action based upon her claim that ANA failed to
 4 provide a refund for a flight canceled in response to the COVID-19 pandemic. ANA moves to
 5 compel arbitration or, in the alternative, to dismiss Plaintiff's Second Amended Complaint
 6 ("SAC") on the grounds that Plaintiff fails to state a claim for breach of contract.

7 This is ANA's second motion to dismiss Plaintiff's claims. In its Order granting ANA's
 8 Motion to Dismiss Plaintiff's First Amended Complaint, this Court held that Article 13 of
 9 ANA's Conditions of Carriage ("COC") required passengers to submit a request as a condition
 10 precedent to receipt of a refund and that Plaintiff's allegations were insufficient to show that
 11 ANA prevented her from performing the condition precedent. The Court granted Plaintiff leave
 12 to amend with respect to two narrow issues: (1) allege facts showing that Article 13 did not
 13 create a condition precedent; or (2) allege more particular facts demonstrating that her
 14 performance of the condition precedent was excused. The SAC fails to comply with the Court's
 15 order or to plead facts that, if proven, would establish a breach of contract. The SAC merely
 16 offers the same factual allegations as set forth in Plaintiff's prior pleadings buttressed by new
 17 conclusory statements to the effect that ANA frustrated Plaintiff's ability to perform the
 18 condition precedent. Accordingly, the SAC does not state a claim for relief against ANA
 19 pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and should be dismissed with
 20 prejudice.

21 As a separate and independent basis for dismissal, Plaintiff revealed for the first time in
 22 the SAC, which is her third pleading, that she contacted Asaptickets.com ("ASAP") in April
 23 2020, and successfully requested a refund, but refused to accept the refund because she did not
 24 want to pay a processing fee that was, at all times, clearly stated in ASAP's Rules and
 25 Conditions. Instead, she opted to sue ANA despite the fact she purchased her tickets from
 26 ASAP. Plaintiff further alleges that this processing fee, which was applied by ASAP in
 27 accordance with its Rules and Conditions, was an attempt by ANA to "direct[ly] frustrat[e] the
 28

1 condition precedent.” Since Plaintiff’s claim against ANA is dependent on her frustration
 2 defense, and her frustration defense is predicated upon the processing fee contained in ASAP’s
 3 Rules and Conditions, Plaintiff’s claim against ANA relies upon and is intertwined with ASAP’s
 4 Rules and Conditions. Therefore, pursuant to the doctrine of equitable estoppel, ANA may
 5 invoke the arbitration provision in ASAP’s Rules and Conditions which mandates binding
 6 arbitration as the exclusive means of resolving claims involving a dispute arising out of ASAP’s
 7 services. As such, Plaintiff’s claim must be resolved by an arbitrator and should be dismissed
 8 with prejudice.

9 **STATEMENT OF ISSUES TO BE DECIDED**

10 The first issue to be decided by way of this motion is whether ANA can compel Plaintiff
 11 to submit her breach of contract claim to arbitration pursuant to the Federal Arbitration Act.

12 The second issue to be decided by way of this motion is whether Plaintiff’s amended
 13 allegations are sufficient to excuse her performance of the condition precedent set forth in
 14 ANA’s Condition of Carriage.

15 **STATEMENT OF RELEVANT FACTS**

16 **I. Plaintiff’s Ticketing and Interactions with ANA and ASAP.**

17 On or around November 2019, Plaintiff purchased passenger tickets through online travel
 18 agent ASAP for ANA flights from San Jose, California, to Tokyo, Japan, on March 23, 2020,
 19 and from Tokyo to San Francisco, California, on April 8, 2020. (SAC, ECF No. 32, ¶ 25).
 20 Plaintiff’s departing flight was operated by ANA as scheduled. (Order dated January 19, 2021,
 21 ECF No. 31, p. 2, ll. 6-7). On or around April 2020, Plaintiff’s return flight from Tokyo to San
 22 Francisco was canceled in response to the COVID-19 pandemic. (SAC, ECF No. 32, ¶ 25).

23 Plaintiff alleges that thereafter, on or around April 2020, she called ASAP to request a refund
 24 and was informed by ASAP that she was required to pay a \$200 fee per ticket in order to procure
 25 a refund. *Id.* at ¶ 18. At all times relevant to the SAC, ASAP’s Rules and Conditions have
 26 clearly stated that “if fare rules allow refunds and/or exchanges, a \$250.00 ITN LLC fee will be
 27 charged to process any refund.” *See Rules and Conditions of ASAP Tickets* (“ASAP Rules and

1 Conditions”), Exh. 4 to Declaration of Peter Vazan (“Vazan Decl.”); Exh. 4 to Declaration of
 2 Grace M. Lau (“Lau Decl.”); Exh. 4 to Req. for Judicial Notice (“RJN”). Plaintiff nevertheless
 3 refused the refund offered. Instead, she called ANA “several times” to request a refund for the
 4 cancelled portion of her trip. (SAC, ECF No. 32, ¶ 25). Plaintiff alleges that she never spoke
 5 with an ANA representative because after waiting for 30-45 minutes each time, her calls
 6 dropped. *Id.* Plaintiff does not allege why the calls were “dropped” or that ANA was
 7 responsible for dropping her calls. ANA has no record of Plaintiff requesting a refund through
 8 its website or ANA’s customer service telephone line. (Order dated January 19, 2021, ECF. No.
 9 31, p. 6, ll. 25-26).

10 **II. Procedural History of Plaintiff’s Claim.**

11 On May 15, 2020, Plaintiff filed a class action lawsuit against ANA, only, for: (1) unjust
 12 enrichment, (2) conversion, (3) breach of contract, (4) money had and received and (5) violation
 13 of California’s Unfair Competition law. ANA filed a motion to dismiss all claims on July 20,
 14 2020. In response to ANA’s motion, Plaintiff filed her First Amended Complaint, which omitted
 15 many of her original claims and only alleged causes of action for breach of contract and
 16 rescission. ANA subsequently filed a motion to dismiss Plaintiff’s First Amended Complaint on
 17 August 17, 2020. The motion contended, among other arguments, that: (1) ANA’s Conditions of
 18 Carriage (“COC”) required Plaintiff to request a refund, a condition precedent that Plaintiff did
 19 not perform and therefore she was not entitled to a refund; and (2) Plaintiff’s state law rescission
 20 claim was preempted by the Airline Deregulation Act. (*See generally* ANA’s Motion to Dismiss
 21 the FAC, ECF No. 18). Plaintiff opposed ANA’s motion, arguing, in relevant part, that ANA
 22 frustrated Plaintiff’s attempts to satisfy the condition precedent by placing her in “an endless
 23 hold loop.” (*See* Plaintiff’s Opposition to ANA’s Motion to Dismiss the FAC, ECF No. 25, p.
 24 3). The Court granted ANA’s Motion in part, dismissed both causes of action and granted
 25 Plaintiff leave to amend the breach of contract cause of action only. (Order dated January 19,
 26 2021, ECF No. 31, p.23, ll.2-3). In doing so, the Court held that ANA’s COC created a
 27 condition precedent and that Plaintiff’s allegations were insufficient to demonstrate that ANA
 28

1 frustrated her performance of this condition precedent. *Id.* at p.22, ll. 15-20. The Court allowed
 2 Plaintiff to amend her complaint to allege additional facts demonstrating that either ANA's COC
 3 did not create a condition precedent to a refund or more particular facts supporting her claim that
 4 her performance of the condition precedent was excused. *Id.* at p.22, ll. 15-20. Plaintiff filed her
 5 SAC on February 5, 2021, with amended allegations regarding her contact with ASAP and ANA
 6 in an attempt to support the breach of contract cause of action.

7 **III. ANA's Conditions of Carriage.**

8 ANA's COC apply to any carriage of a passenger aboard an ANA flight, incidental
 9 services to that carriage, or services provided by ANA at fares, rates and charges published in
 10 connection with the COC. (See ANA's Conditions of Carriage, Exh. A to SAC, ECF No. 32,
 11 p.19). ANA's refund policy is outlined in Articles 7 and 13 of the COC. (See ANA's
 12 Conditions of Carriage, Exh. A to SAC, ECF No. 32, pp. 23, 29). Article 13(B)(1) states, "ANA
 13 will make a refund to the person named in a Ticket or, to the person who purchased the Ticket
 14 **upon presentation to ANA of satisfactory evidence** that he/she is entitled by these Conditions
 15 of Carriage to such refund." *Id.* (*emphasis added*). Article 13(B)(3) elaborates: "ANA will
 16 make a refund only if all unused Flight Coupons and a Passenger Coupon or Passenger Receipt
 17 (or, in the case of an Electronic Ticket, the itinerary/Receipt) are surrendered to ANA." *Id.* This
 18 Court has interpreted this Article as requiring a request as a condition precedent to receipt of a
 19 refund. (Order dated January 19, 2021, ECF No. 31, p. 22, ll. 15-20).

20 ASAP is not an authorized ticket agent of ANA. (Order dated January 19, 2021, ECF
 21 No. 31, p. 2, 6-7). ANA does not have a contract with ASAP authorizing ASAP to sell tickets on
 22 ANA's behalf. *Id.* There are no policies contained in the COC discussing tickets purchased
 23 through unauthorized agents or refund policies for such tickets. (See ANA's Conditions of
 24 Carriage, Exh. A to SAC, ECF No. 32, pp. 17-35).

25 **IV. ASAP's Policies Pursuant to its Rules and Conditions and Relation to International
 26 Travel Network.**

27 ASAP is an online ticket agency that purports to provide "cheap airline tickets
 28 worldwide" and "the best flight deals that are not available online." (See *What is ASAP Tickets?*

1 (“ASAP About Page”), Exh. 1 to Vazan Decl., p. 1; Exh. 1 to Lau Decl., p.1; Exh. 1 to RJN,
 2 p.1). At the bottom of all pages on ASAP’s website is a hyperlink to ASAP’s Rules and
 3 Conditions. (See Vazan Decl. ¶ 8). All customers of ASAP are advised that “if [they] continue
 4 to browse and use [the ASAP] website, [they] are agreeing to comply and be bound by the
 5 conditions of use.” (See ASAP Rules and Conditions, Exh. 4 to Vazan Decl., p. 1; Exh. 4 to Lau
 6 Decl., p.1; Exh. 4 to RJN, p.1). Furthermore, when booking flights through ASAP, all users are
 7 directed to a webpage entitled “Review Details and Confirm Your Trip” which requires users to
 8 input billing information and check a mandatory box indicating they have read, understood and
 9 accepted “present Terms and Conditions.” (See Vazan Decl. ¶ 7; *Review Details and Confirm*
 10 *Your Trip* (“ASAP Booking Page”), Exh. 3 to Vazan Decl.; Exh. 3 to Lau Decl.; Exh. 3 to RJN).
 11 The words “Terms and Condition” are **bolded**, underlined and hyperlinked to a pop-up box that
 12 restates the ASAP Rules and Conditions. *Id.*

13 Included in the ASAP’s Rules and Conditions is an arbitration provision that states
 14 plainly that the “exclusive means of resolving any dispute or claim arising out of or relating to
 15 this Agreement (including any alleged breach thereof), the Service or the Website shall be
 16 binding arbitration.” (See ASAP Rules and Conditions, Exh. 4 to Vazan Decl., p. 1); Exh. 4 to
 17 Lau Decl., p.1; Exh. 4 to RJN, p.1. Regarding fare restrictions and rules, ASAP’s Rules and
 18 Conditions state that “if fare rules allow refunds...a \$250.00 ITN LLC fee will be charged to
 19 process any request.” *Id.* at p. 4. “ITN LLC” is defined in the Rules and Conditions as
 20 International Travel Network, LLC. *Id.* at p. 2. International Travel Network, LLC (“ITN,
 21 LLC”) is a travel-management consolidator and provider of travel and related services to
 22 consumers that does business as ASAP Tickets. (See Vazan Decl., ¶ 3.; *see also Seller Details*,
 23 Exh. 2 to Vazan Decl.; Exh. 2 to Lau Decl.; Exh. 2 to RJN.) Provided International Travel
 24 Network, LLC does business as a registered seller of travel, it is subject to regulations to
 25 California Business and Professions Code § 17550. *Id.*

26 **V. DOT Guidelines in Response to COVID-19.**

27 On April 3, 2020, in response to a high volume of complaints regarding cancelled flights
 28

1 as a result of COVID-19, the DOT released a Notice stating the Aviation Enforcement Office
2 would view any contract of carriage or airline policy that denied refunds to passengers following
3 cancellation of a flight as a violation of the carrier's obligation that could be subject to an
4 enforcement action. (*See Enforcement Notice Regarding Refunds by Carriers Given the*
5 *Unprecedented Impact of the COVID-19 Public Health Emergency on Air Travel* ("DOT
6 Notice"); Exh. 5 to Lau Decl., p. 2; Exh. 5 to RJN, p.1).

7 On May 12, 2020, the DOT clarified its views in its published Frequently Asked
8 Questions, which stated that the Aviation Enforcement Office would focus its enforcement
9 actions on instances where carriers disregarded the requirement to offer refunds, failed to honor
10 their refund policies, or their refund policies were deemed “unfair or deceptive” under 49 U.S.C.
11 § 41712. *See Frequently Asked Questions Regarding Airline Ticket Refunds Given the*
12 *Unprecedented Impact of the COVID-19 Public Health Emergency on Air Travel (“FAQs”),*
13 Exh. 6 to Lau Decl., p. 2, No. 1); Exh. 6 to RJN, p.2, No. 1). The DOT also clarified that where
14 passengers purchased airline tickets from online travel agencies, such agencies were required to
15 make the proper refunds if flight service could not be performed as contracted pursuant to 14
16 CFR § 399.80(1). (FAQs, Exh. 6 to Lau Decl., p. 2, No. 3; Exh. 6 to RJN, p. 2 No. 3).

LEGAL STANDARD

18 ANA brings this motion pursuant to Rule 12(b)(6) of the Federal Rules of Civil
19 Procedure and the Federal Arbitration Act (“FAA”). To survive a motion to dismiss under Rule
20 12(b)(6), a complaint must “contain sufficient factual matter, accepted as true, to state a claim to
21 relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “Threadbare
22 recitals of the elements of a cause of action, supported by mere conclusory statements, do not
23 suffice.” *Id.* at 679. A complaint’s allegations must make relief plausible, not merely
24 conceivable, when taken as true. *Somers v. Apple, Inc.*, 729 F.3d 953, 960 (9th Cir. 2013).
25 Allegations “that are merely consistent with a defendant’s liability, [stop] short of the line
26 between possibility and plausibility of entitlement to relief,” and thus are inadequate. *Id.* When
27 evaluating a Rule 12(b)(6) motion, courts are limited to the allegations of the complaint,

1 documents incorporated by reference and matters which are subject to judicial notice. *Louisiana*
 2 *Mun. Police Employees' Ret. Sys.*, 829 F. 3d 1048, 1063 (9th Cir. 2016).

3 Congress in enacting the Federal Arbitration Act directed courts to treat arbitration
 4 agreements as “valid, irrevocable, and enforceable.” *See Epic Sys. Corp. v. Lewis*, 138 S. Ct.
 5 1612, 1621 (2018) (*citing* 9 U.S.C. § 2). The FAA establishes “a liberal federal policy favoring
 6 arbitration agreements” and the “fundamental principle that arbitration is a matter of contract.”
 7 *Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1126 (9th Cir. 2013). The party moving to
 8 compel arbitration bears the burden of demonstrating the existence of an arbitration agreement
 9 by a preponderance of the evidence. *Ashbey v. Archstone Prop. Mgmt. Inc.*, 785 F. 3d 1320,
 10 1323 (9th Cir. 2015).

11 ARGUMENT

12 I. The Allegations in Plaintiff's SAC Require Arbitration of Her Claim against ANA.

13 Plaintiff's claim should be dismissed with prejudice pursuant to her binding arbitration
 14 agreement with ASAP. Plaintiff, in purchasing her tickets through ASAP, agreed to resolve
 15 claims regarding any disputes “arising out of or relating to this Agreement (including any alleged
 16 breach thereof), the Service, or the Website” exclusively through binding arbitration. (*See* ASAP
 17 Rules and Conditions, Exh. 4 to Vazan Decl., p. 1; Exh. 4 to Lau Decl., p.1; Exh. 4 to RJN, p.1).
 18 The Federal Arbitration Act (“FAA”) provides that written agreements to arbitrate “shall be
 19 valid, irrevocable, and enforceable.” 9 U.S.C. § 2. As such, Plaintiff must submit her claim to
 20 individual arbitration. *See, e.g., Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985);
 21 *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 273 (1995).

22 A. Plaintiff Had Inquiry Notice of ASAP's Rules and Conditions and Is Bound 23 By Its Provisions Including the Arbitration Clause.

24 It is the court's duty to interpret an agreement and determine whether the parties intended
 25 to arbitrate grievances concerning a particular matter. *See SEIU Local 121RN v. Los Robles*
 26 *Reg'l Med. Ctr.*, 976 F. 3d 849, 855 (9th Cir. 2020). In determining whether a valid arbitration
 27 exists, courts apply ordinary state law principles that govern the formation of contracts. *Nguyen*
 28 *v. Barnes & Noble Inc*, 763 F. 3d 1171, 1175 (9th Cir 2014). Under California law, contract

1 formation requires mutual assent. *See Binder v Aetna Life Ins. Co.*, 75 Cal. App. 4th 832, 850
 2 (1999). In the context of online consumer agreements or transactions, mutual assent frequently
 3 turns on whether the consumer had reasonable notice of a merchant's terms of service
 4 agreement. *Needle v. Golden 1 Credit Union*, 474 F. Supp. 3d 1097, 1103 (N.D. Cal. 2020).
 5 Online agreements are typically executed in one of three forms: (1) clickwrap agreements, in
 6 which website users are required to click on an "I agree" box after being presented with a list of
 7 terms and conditions of use; (2) browserwrap agreements, where a website's terms and
 8 conditions of use are generally posted on the website via a hyperlink at the bottom of the screen,
 9 and (3) hybrid "sign-up" agreements, in which a user signs up to use an internet product or
 10 service and the signup screen states that acceptance of a separate agreement is required before
 11 the user can access the service. *See Allen v. Shutterfly, Inc.*, No. 20-cv-02448 BLF, 2020 WL
 12 5517172 at *6 (N.D. Cal. Sep. 14, 2020).

13 Regardless of the type of online contract, if "there is no evidence that the website user
 14 had actual knowledge of the agreement," its enforceability "turns on whether the website puts a
 15 reasonably prudent user on inquiry notice of the terms of the contract." *Nguyen*, 763 F. 3d at
 16 1177. To determine whether a user has inquiry notice of the contract terms, courts assess "the
 17 design and content of the website and the agreement's webpage." *Id.* In *Maree v. Deutsche*
 18 *Lufthansa AG*, another COVID-19 class action lawsuit brought against an airline for the airline's
 19 alleged failure to provide a refund, defendant Lufthansa similarly sought to enforce
 20 Expedia.com's Terms of Use. *Maree v. Deutsche Lufthansa AG*, No. SACV 20-855-MWF
 21 (MRWx), 2021 WL 267853 (C.D. Cal. Jan. 26, 2021). There, the court held that the plaintiff did
 22 not have inquiry notice of Expedia.com's Terms of Use because the hyperlink to the terms was
 23 "not highlighted, underlined, in all capital letters, or displayed inside of a conspicuous clickable
 24 box." *Id.* at *3. The *Maree* court further noted that the hyperlink was difficult to distinguish
 25 because it "appear[ed] on a cluttered page nestled between several lines of extraneous, colored
 26 and bolded text." *Id.* at *4.

27 This case is distinguishable. Here, ASAP has a browserwrap agreement in the form of
 28

1 the hyperlink found at the bottom of all ASAP webpages leading users to its Rules and
 2 Conditions. (See Vazan Decl. ¶ 8). In addition, Plaintiff and all users who purchase tickets
 3 through ASAP are also subject to a hybrid clickwrap agreement on the ASAP Booking Page
 4 which, unlike Expedia.com, requires them to affirmatively check a box indicating they read,
 5 understood and accepted ASAP's Rules and Conditions before they can purchase tickets. (See
 6 ASAP Booking Page, Exh. 3 to Vazan Decl., p. 8, Exh. 3 to Lau Decl., p. 8; Exh. 3 to RJD, p.
 7 8). Users cannot pay for their tickets without checking this box. (Vazan Decl. ¶ 7). Unlike
 8 Expedia.com, this agreement is not embedded in the middle of text but rather, is placed at the
 9 bottom of the page, right above a button that reads "Pay Securely Now" and is in a light blue box
 10 that distinguishes it from all other sections on the webpage. (See ASAP Booking Page, Exh. 3 to
 11 Vazan Decl., p. 8, Exh. 3 to Lau Decl., p. 8; Exh. 3 to RJD, p. 8). The hyperlink to the pop-up
 12 box containing the Rules and Conditions is in blue font, **bolded** and underlined. *Id.*

13 Where situations resemble clickwrap agreements and "an offeree receives an opportunity
 14 to review terms and conditions and must affirmatively indicate assent" to the conditions, users
 15 have had adequate notice of the contract terms even if the user had not actually clicked the link
 16 or otherwise read the terms. *Mohamed v. Uber Technologies, Inc.*, 109 F. Supp. 3d 1185, 1197
 17 (N.D. Cal. 2015); *see also Holl v. United Parcel Service, Inc.*, No. 16-cv-05856-HSG, 2017 WL
 18 11520143 at *5 (N.D. Cal. Sep. 18, 2017). Here, the agreement to ASAP's Rules and Conditions
 19 are visually distinguishable from the remainder of the webpage, clearly denotes a hyperlink to
 20 the text of the Rules and Conditions and requires affirmative action on the part of the user by
 21 checking the box to accept ASAP's terms. (See ASAP Booking Page, Exh. 3 to Vazan Decl., p.
 22 8; Exh. 3 to Lau Decl., p. 8; Exh. 3 to RJD, p. 8). Regardless of whether Plaintiff read these
 23 terms, she was provided sufficient inquiry notice and as such is subject to the terms of ASAP's
 24 Rules and Conditions including its arbitration provision.

25 **B. The SAC Relies upon ASAP's Rules and Conditions to Demonstrate ANA
 26 Frustrated the Condition Precedent and, therefore, ANA May Enforce
 27 ASAP's Arbitration Provision.**

28 The right to compel arbitration stems from a contractual right which generally may not be

1 invoked by one who is not a party to the agreement. *Britton v. Co-op Banking Group*, 4 F.3d
 2 742, 744 (9th Cir. 1993). However, the Ninth Circuit has recognized that under principles of
 3 equitable estoppel a non-signatory may compel a signatory to a contract to arbitrate. *Mundi v.*
 4 *Union Sec. Life Ins. Co.*, 555 F.3d 1045-1047 (9th Cir. 2009). Under equitable estoppel, a
 5 signatory to an agreement may be precluded from “claiming the benefits of a contract while
 6 simultaneous attempting to avoid the burden that contract imposes.” *Id*; *see also Goldman v.*
 7 *KPMG, LLP*, 173 Cal. App. 4th 209. 220 (2009); *Mundi*, 555 F.3d at 1046; *Kramer*, 705 F.3d at
 8 1128. In this context, equitable estoppel may be used to “prevent a party from using the terms or
 9 obligations of an agreement for its basis against a non-signatory while at the same time refusing
 10 to arbitrate with the non-signatory under another clause of the same agreement.” *Kramer*, 705
 11 F.3d at 1129 (quoting *Jones v. Jacobson*, 195 Cal. App. 4th 1, 20 (2011)). The Ninth Circuit has
 12 applied equitable estoppel to compel arbitration in two circumstances: (1) when a signatory must
 13 rely on the terms of the written agreement in asserting its claims against the non-signatory, and
 14 (2) when the signatory alleges substantially interdependent and concerted misconduct by non-
 15 signatory and another signatory and “the allegations of interdependent misconduct [are] founded
 16 in or intimately connected with the obligations of the underlying agreement.” *Id.* at 1128-1129.
 17 When examining whether facts in a complaint rely on terms, duties and obligations in the
 18 contract containing the arbitration provision, courts consider whether the allegations are “in any
 19 way **founded in or bound up** with the terms or obligations” in the contract. *In re Pacific*
 20 *Fertility Center Litigation*, 814 Fed. Appx. 206, 209 (9th Cir. 2020) (*citing Goldman*, 173 Cal.
 21 App. 4th at 230) (*emphasis added*). Put differently, if the claims are “fully viable without
 22 reference to the terms of the contract, equitable estoppel does not apply.” *Id.*

23 Here, ANA is entitled to enforce Plaintiff’s commitments to arbitrate under ASAP’s
 24 Rules and Conditions because the SAC relies on her contractual relationship with ASAP as set
 25 forth in ASAP’s Rules and Conditions in order to support her claim against ANA. Pursuant to
 26 the Court’s Order, Plaintiff was granted leave to amend the FAC to either provide additional
 27 facts demonstrating that ANA’s Conditions of Carriage did not include a condition precedent or
 28

1 include additional allegations demonstrating she was excused from performing the condition
 2 precedent. (Order dated January 19, 2021, ECF No. 31, p.22, ll. 15-20). The SAC seemingly
 3 concedes that the Conditions of Carriage contains a condition precedent and instead “doubled
 4 down” on the allegations supporting Plaintiff’s claim that she was prevented from performing the
 5 condition because ANA frustrated the condition precedent. (See SAC. ECF No. 32, ¶¶ 16-21,
 6 46, 50). Specifically, Plaintiff alleges:

7 After reaching a[n ASAP] representative, Plaintiff was informed that she would
 8 have to pay \$200 per ticket in order procure a refund from All Nippon. That is
 9 not part of the agreement with All Nippon and is **direct frustration of the**
condition precedent.”

10 *Id. at ¶ 18 (emphasis added).*

11 This paragraph clearly states ASAP’s contractual requirements directly frustrated
 12 Plaintiff’s ability to comply with the condition precedent as set forth in the COC. *Id.* Plaintiff
 13 agreed to be bound by ASAP’s Rules and Conditions when she used ASAP to purchase her ANA
 14 flights and its terms explicitly include this processing fee as a contractual term for the issuance of
 15 a refund. (See ASAP’s Rules and Conditions, Exh. 4 to Vazan Decl., p. 4; Exh. 4 to Lau Decl.,
 16 p. 4; Exh. 4 to RJD, p. 4). Absent Plaintiff’s agreement regarding the processing fee, the SAC is
 17 not viable as it is otherwise devoid of new factual allegations that demonstrate that ANA
 18 frustrated Plaintiff’s ability to perform the condition precedent to a refund. Plaintiff’s assertion
 19 that she was excused from performance due to ANA’s frustration of the condition precedent is
 20 therefore “bound up with” the processing fee provision in ASAP’s Rules and Conditions to
 21 warrant equitable estoppel and ANA should be permitted to compel arbitration in compliance
 22 with ASAP’s Rules and Conditions. *See In re Pacific Fertility Center Litigation*, 814 Fed. Appx.
 23 at 209 (9th Cir. 2020). Since Plaintiff’s contention that she does not need to pay a processing fee
 24 to receive a refund is a dispute that relates to a specific provision in ASAP’s Rules and
 25 Conditions, this matter should be submitted to arbitration pursuant to ASAP’s terms. (See
 26 ASAP’s Rules and Conditions, Exh. 4 to Vazan Decl., p. 1; Exh. 4 to Lau Decl., p. 1; Exh. 4 to
 27 RJD, p. 1).

1 Because Plaintiff is required to arbitrate her claims against ANA, this Court should
 2 dismiss the SAC. Although the Federal Arbitration Act provides by its terms for a “stay [of] the
 3 trial of the action until such arbitration has been had in accordance with the terms of the
 4 agreement,” 9 U.S.C. § 3, the Court has discretion to dismiss under Rule 12(b)(6) if it finds that
 5 all of the claims before it are arbitrable. *Luna v. Kemira Specialty, Inc.*, 575 F.Supp.2d 1166,
 6 1178 (C.D. Cal. 2008); *see also Simula Inc. v. Autoliv, Inc.*, 175 F.3d 716, 726 (9th Cir. 1999).
 7 Here, because Plaintiff’s frustration defense is crucial to the survival of her breach of contract
 8 claim and is based on a disputed provision in ASAP’s Rules and Conditions, Plaintiff’s claim
 9 must be submitted to arbitration. Accordingly, dismissal is appropriate. At a minimum,
 10 however, this Court should stay the proceeding pending resolution of the arbitration.

11 **II. As a Separate and Independent Basis for Dismissal, the SAC Must Be Dismissed
 12 Because It Does Not Plead Facts Sufficient to State a Claim for Relief Against ANA.**

13 Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, dismissal is proper
 14 where a complaint fails to allege sufficient facts “to support a cognizable legal theory.” *Caltex
 15 Plastics, Inc. v. Lockheed Martin Corp.*, 824 F.3d 1156, 1159 (9th Cir. 2016). The SAC fails to
 16 provide additional facts supporting Plaintiff’s contention that ANA intentionally prevented her
 17 from performing the condition precedent. Instead, the SAC alleges the same facts regarding
 18 ANA’s actions couched in legal conclusions. The only new facts alleged in the SAC address
 19 Plaintiff’s interactions with ASAP and only demonstrate that Plaintiff agreed to ASAP’s Rules
 20 and Conditions then, rather than following ASAP’s Rules and Conditions to receive a refund, she
 21 rejected ASAP’s offer. None of these new allegations indicate ANA took any action to frustrate
 22 Plaintiff’s performance of the condition precedent and, therefore, the SAC fails to plead facts
 23 sufficient to state a claim of relief against ANA and must be dismissed.

24 **A. Plaintiff’s Amended Allegations Concede ANA’s COC Contain a Condition
 25 Precedent and Do Not Demonstrate She was Excused from Performing the
 26 Condition.**

27 The SAC fails to address the issues identified by the Court in its Order dismissing the
 28 FAC. In the Court’s Order dismissing the FAC, the Court held, in relevant part, that:

1 ANA's motion to dismiss Claim 1 for failure to state a claim is GRANTED
 2 WITH LEAVE TO AMEND. On amendment, Bugarin may attempt to allege
 3 facts showing that Section 13(B) does not create a condition precedent to refund.
 4 For the reasons discussed above, it is the Court's view that the language in
 5 question does appear to create a condition precedent. However, as Bugarin has
 6 not previously addressed the language in her pleading, it may be that she can
 7 allege facts showing the contrary. To the extent Bugarin claims that her
 8 performance of any condition precedent was excused, she shall allege facts
 9 supporting that claim with more particularity.

10 Order dated January 19, 2021, ECF No. 31, p.22, ll. 14-20.

11 Thus, the Court granted Plaintiff leave to amend with respect to two narrow issues: (1) to
 12 allege facts showing that Section 13(B) does not create a condition precedent to a refund, or (2)
 13 if it does create a condition precedent, allege facts with more particularity that would support her
 14 claim that performance of any condition precedent was excused. *Id.* The SAC did not allege any
 15 facts demonstrating that Section 13(B) of the COC does not create a condition precedent to a
 16 refund. (*See generally* SAC, ECF No. 32). Quite the opposite, the SAC concedes that Section
 17 13(b) is, in fact, a condition precedent to the issue of a refund. *Id.* at ¶¶ 16-17. Instead, the SAC
 18 attempted to "beef up" the allegations that Plaintiff's performance of the condition precedent was
 19 excused. *Id.* at ¶¶ 46, 17-21.

20 In the FAC, Plaintiff alleged she called ANA several times to request a refund and was
 21 on the phone several hours each time but was never able to reach a representative. (*See* FAC,
 22 ECF No. 15, ¶ 19). The Court found such allegations insufficient to support a finding that
 23 Plaintiff was excused from performing the condition precedent set forth in ANA's COC. (Order
 24 dated January 19, 2021, ECF No. 31, p. 22, ll. 6-13). The SAC did little to expand these
 25 allegations and instead provided conclusory statements in support of Plaintiff's legal theory that
 26 ANA frustrated the condition precedent by requiring her to hold for "30-45 minutes." (SAC,
 27 ECF No. 32, ¶ 20). Instead, the SAC makes the same factual allegations that appeared in the
 28 FAC, albeit slightly rephrased. The SAC alleges: "extensive hold times, and dropped calls (after
 29 extensive hold times)" created an "unnecessary bottleneck [that] was designed to prevent issuing
 30 refunds. The only difference between these allegations and those in the FAC alleging an"
 31 "endless holding pattern of Defendant's design," "endless hold loop," "multiple hours-long
 32

1 holding pattern” is semantics. (See SAC, ECF No. 32, ¶ 21; *see also* Opp to Motion to Dismiss,
 2 ECF No. 25, p. 9, l. 8; p. 10, l. 12; p. 13, l. 2).

3 Courts are not bound to accept as true allegations that are legal conclusions even if cast in
 4 the form of factual allegations. *See Ashcroft v. Iqbal*, 556 U.S. at 681. The SAC’s conclusory
 5 summation that ANA’s alleged “unnecessary bottleneck” prevented the issue of refunds is a
 6 mere restatement of California law on the prevention doctrine without any basis in factual
 7 allegations. *See FNBN Rescon I, LLC v. Citrus El Dorado, LLC*, 725 F. App’x 448,451 (9th Cir.
 8 2018); *City of Hollister v. Monterey Ins. Co.*, 165 Cal. App.4th 455, 490 (Cal. Ct. App. 2008).
 9 The only factual allegations supporting this statement are substantially similar to the statements
 10 this Court deemed insufficient before; however, rather than being on hold for “several hours each
 11 time,” in the SAC, Plaintiff alleged she was actually only on hold for 30-45 minutes. (See FAC,
 12 ECF No. 15, ¶ 19; SAC, ECF No. 32, ¶ 20). If Plaintiff’s allegations that she was kept on hold
 13 for “several hours” did not pass muster to properly allege frustration of the contractual terms,
 14 surely Plaintiff’s new allegation that she was only on hold for “30-45 minutes” before her call
 15 was “dropped” does not pass muster.

16 To the extent the SAC attempts to assert that ANA’s automated phone operator system
 17 includes messages “partially in Japanese,” as Plaintiff has pleaded in her SAC, ANA is a
 18 Japanese company. The SAC does not include any allegation that this was done intentionally to
 19 thwart Plaintiff’s attempts to request a refund or that she was unable to understand the messaging
 20 system at all – in fact, the SAC alleges that the recording was only “partially” in Japanese. (See
 21 SAC, ECF No. 32, ¶ 21). As the SAC notes, ANA is “the largest airline in Japan by revenue and
 22 passenger numbers,” is organized under the laws of Japan, and has its headquarters in Japan.
 23 (See SAC, ECF No. 32, ¶ 26). A messaging system partially in English and partially in Japanese
 24 would be expected of a Japanese airline with many Japanese-speaking passengers.

25 Taken together, Plaintiff’s amendments equate to slight rephrasing and unsupported legal
 26 conclusions couched as factual allegations. The few additional factual allegations included in the
 27 SAC do not demonstrate that Plaintiff submitted a request to ANA, what actions ANA allegedly
 28

1 took to prevent Plaintiff from performing the condition or otherwise excuse Plaintiff's
 2 nonperformance. The SAC fails to meet the requirements set out in the Court's Order dismissing
 3 the FAC or to state a claim for relief against ANA. Accordingly, it should be dismissed in its
 4 entirety pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

5 **B. Plaintiff's Amended Allegations Concede She Was Offered a Refund from
 6 ASAP and that She Refused to Accept the Refund.**

7 Although this is Plaintiff's third attempt at pleading her claim, this is the first time that
 8 she has alleged that she contacted the travel agent from whom she purchased her ticket, ASAP,
 9 in April 2020, and was actually offered a refund but refused the refund because of an associated
 10 ASAP fee imposed by ASAP. (See SAC, ECF No. 32, ¶ 18). It has been almost ten months
 11 since Plaintiff filed her original complaint. The tardiness of this allegation suggests that Plaintiff
 12 has not been intellectually honest with ANA and the Court. The gravamen of Plaintiff's claim,
 13 and the purported class, is that she was not offered a refund for her cancelled flight. However,
 14 Plaintiff now admits that this is actually false.

15 It is undisputed that Plaintiff purchased her ticket through ASAP. (SAC, ECF No. 32, ¶
 16 9; Bugarin Decl., Exh. B to SAC, ECF No. 32, ¶ 2; Order dated January 19, 2021, ECF No. 31,
 17 p. 2, l. 5). ASAP touts itself as a travel agency that specializes in "cheap airline tickets" and
 18 "providing the best flight deals that are not available online." (See ASAP About Page; Exh. 1 to
 19 Vazan Decl., p. 1; Exh. 1 to Lau Decl., p. 1; Exh. 1 to RJN, p. 1). ASAP is not an authorized
 20 ticket agent of ANA and does not have a contractual relationship with ANA. (Order dated
 21 January 19, 2021, ECF No. 31, p. 2, ll. 6-7). Nevertheless, likely because of the low fares
 22 offered by ASAP, Plaintiff elected to purchase her flights from ASAP rather than from ANA
 23 directly. Because Plaintiff contracted with ASAP when she purchased her ticket, she is bound by
 24 the Rules and Conditions of ASAP Tickets. (See ASAP Rules and Conditions; Exh. 4 to Vazan
 25 Decl., p. 1; Exh. 4 to Lau Decl., p. 1; Exh. 4 to RJN, p. 1). Notably, the SAC does not dispute
 26 that ASAP's conditions apply. One of ASAP's conditions states, in pertinent part, as follows:

27 If fare rules allow refunds and/or exchanges, a \$250.00 ITN LLC fee will be
 28 charged to process any refund and/or exchange request. This fee will be collected
 in addition to the penalties charged directly by the airline and/or recalled by the

1 airline from ITN LLC.

2 *Id.* at p. 4, General Rules and Conditions, Fare Restrictions and Rules, 1. Cancellations and
3 Refunds.

4 Under the terms of the COC, ANA fare rules allow for a refund here. (ANA's Conditions
5 of Carriage, Exh. A to SAC, pp. 29-30). However, the refund is subject to a fee of "\$200 per
6 ticket in order to procure a refund" charged by ASAP. (Bugarin decl., Exh. B to SAC, p.1, ¶4, ll.
7 16-18). The discrepancy between the alleged \$200 fee in the SAC and the "\$250 ITN LLC fee"
8 in ASAP's Rules and Conditions appears to indicate that either the ITN LLC fee increased from
9 \$200 when Plaintiff purchased her ticket in November 2019 to \$250, or that Plaintiff was
10 misinformed regarding the fee amount. Regardless of the fee amount, it is uncontested that
11 Plaintiff's Declaration and ASAP's Rules and Conditions evidence that ASAP requires
12 passengers to pay a fee when seeking a refund or exchange.

13 ITN, LLC is International Travel Network, a travel-management consolidator and seller
14 of travel that does business as ASAP Tickets. (See Vazan Decl. ¶¶ 3-4; *see also Seller Details*,
15 Exh. 2 to Vazan Decl.). ITN, LLC is a registered seller of travel in the state of California and is
16 therefore subject to regulations under California Business and Professions Code § 17550. *Id.*
17 Accordingly, pursuant to Cal. Bus. & Prof. §17550.14, as a seller of travel, ITN, LLC has an
18 obligation to either provide travel services purchased by the passenger or make a refund. CAL.
19 BUS. & PROF. §17550.14 (West 2021). This regulation comports with DOT guidelines advising
20 passengers that have purchased tickets from online ticket agencies to contact such agencies as
21 they are required to provide proper refunds. (See FAQs; Exh. 6 to Lau Decl., No. 3; Exh. 6 to
22 RJN, No. 3). Given this, in accordance with both state and federal regulatory bodies, ASAP and
23 ITN, LLC were the appropriate entities from which Plaintiff was expected to request a refund.
24 Again, Plaintiff decided not to purchase tickets directly from ANA and willingly entered into a
25 bargain with ASAP when she purchased a reduced fare ticket subject to ASAP's Rules and
26 Conditions. The ITN LLC processing fee charged by ASAP does not apply to tickets that are
27 sold directly by ANA to passengers.

When Plaintiff requested a refund for her canceled flights from ASAP, she was admittedly offered a refund pursuant to its Rules and Conditions but she expressly rejected the refund. (Bugarin Decl., Exh. B to SAC, ECF No. 32, ¶ 4). It would be inequitable to allow Plaintiff to recover a refund under ANA's policies because she is unhappy with the contract she made with ASAP. Furthermore, the DOT guidelines are not intended to rewrite contractual provisions merely because passengers are unsatisfied with their bargains. Rather, the Aviation Enforcement Office is focused on enforcing actions where a carrier or ticket agent disregarded the requirement to offer refunds, failed to honor its refund policies or where their refund policies or practices are otherwise "unfair or deceptive." (See FAQs; Exh. 6 to Lau Decl., No. 1, 3; Exh. 6 to RJN, Nos. 1, 3). Neither ASAP nor ANA altered their refund policies or refused to honor them in this case. ASAP offered to refund Plaintiff pursuant to its Rules and Conditions regarding the processing fee but Plaintiff refused the refunding. ANA has provided refunds to all passengers that have properly requested one pursuant to its Conditions of Carriage. Accordingly, Plaintiff's claim against ANA for breach of contract fails and her complaint should be dismissed in its entirety with prejudice.

III. ANA's Evidentiary Objections to Plaintiff's Exhibit B to the SAC.

17 ANA hereby objects to the following evidence presented in Plaintiff's declaration in
18 support of the SAC:

Objection No. 1:

20 **Objection:** "I am entitled to a refund without having to pay a \$200 fee per ticket." *See* Bugarin
21 Decl., ¶ 4, l. 19

22 **Basis for Objection:** Conclusion of Law. Pursuant to Federal Rule of Evidence 701, lay witness
23 testimony is limited to the witness' opinion based on his or her perception and must be helpful to
24 clearly understand witness' testimony or determine a fact in issue. FED. R. EVID. 701 (West
25 2021). Here, Plaintiff does neither and improperly opines regarding a conclusion of law, *i.e.*,
26 that she is entitled to a refund without paying the \$200 fee in ASAP's Rules and Conditions.
27 "Neither a lay person nor an attorney may presume to instruct the court in the law." *A&M*

1 *Records, Inc. v. Napster, Inc.*, No. C9905183MHP, 2000 WL 1170106 at *11 (N.D. Cal. Aug.
 2 10, 2000).

3 **Objection No. 2:**

4 **Objection:** “All Nippon hung up on me each time.” *See* Bugarin Decl., ¶ 6, 1. 2.

5 **Basis for Objection:** Lacks Foundation. FED. R. EVID. 602 (West 2021). Plaintiff has failed to
 6 demonstrate that there is a factual basis underlying her assertion that ANA hung up on her and
 7 has only pled that her calls to ANA “dropped” after being on hold for some time.

8 **Objection No. 3:**

9 **Objection:** “All Nippon made it impossible for me to reach a live person and made it
 10 impossible in a refund.” *See* Bugarin Decl., ¶ 7, 11. 3-4.

11 **Basis for Objection:** Conclusion of Law. Pursuant to Federal Rule of Evidence 701, lay witness
 12 testimony is limited to the witness’ opinion based on his or her perception and must be helpful to
 13 clearly understand witness’ testimony or determine a fact in issue. FED. R. EVID. 701 (West
 14 2021). Here, Plaintiff does neither and opines regarding a conclusion of law, *i.e.*, that ANA
 15 frustrated the condition precedent by making it impossible to request a refund. “Neither a lay
 16 person nor an attorney may presume to instruct the court in the law.” *A&M Records, Inc. v.*
 17 *Napster, Inc.*, No. C9905183MHP, 2000 WL 1170106 at *11 (N.D. Cal. Aug. 10, 2000).

18 **Objection No. 4:**

19 **Objection:** “All Nippon did not provide alternative means by which I could obtain a refund”
 20 *See* Bugarin Decl., ¶ 8, 1. 5.

21 **Basis for Objection:** Lacks Foundation and Personal Knowledge. FED. R. EVID. 602 (West
 22 2021). Plaintiff has failed to set forth facts demonstrating that there was no alternative means by
 23 which she could have obtained a refund and does not provide any evidence that would support a
 24 finding that she has personal knowledge regarding all possible means of obtaining a refund from
 25 ANA.

26 **Objection No. 5:**

27 **Objection:** “I am the one who paid for the tickets and therefore am entitled to a full refund

1 pursuant to All Nippon's Conditions of Carriage." See Bugarin Decl., ¶ 9, ll. 6-7.

2 **Basis for Objection:** Conclusion of Law. Pursuant to Federal Rule of Evidence 701, lay witness
 3 testimony is limited to the witness' opinion based on his or her perception and must be helpful to
 4 clearly understand witness' testimony or determine a fact in issue. FED. R. EVID. 701 (West
 5 2021). Here, Plaintiff does neither and improperly opines regarding a conclusion of law, *i.e.*,
 6 that she is entitled to a full refund pursuant to ANA's COC. "Neither a lay person nor an
 7 attorney may presume to instruct the court in the law." *A&M Records, Inc. v. Napster, Inc.*, No.
 8 C9905183MHP, 2000 WL 1170106 at *11 (N.D. Cal. Aug. 10, 2000).

9 **CONCLUSION**

10 For the foregoing reasons, Defendant All Nippon Airways respectfully requests that the
 11 Court compel Plaintiff to submit her claim to arbitration and/or dismiss Plaintiff's Second
 12 Amended Complaint in its entirety. At the hearing on its motion to dismiss, ANA also
 13 respectfully requests that the court sustain the above objections and strike these portions of the
 14 declaration of Plaintiff Ashley Bugarin.

15 Dated: March 5, 2021

16 CONDON & FORSYTH LLP

17 By:/s/ Scott D. Cunningham

18 SCOTT D. CUNNINGHAM
 19 JENNIFER J. JOHNSTON
 20 IVY L. NOWINSKI
 21 GRACE M. LAU
 22 Attorneys for Defendant
 23 ALL NIPPON AIRWAYS CO., LTD.